IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-

RANDY K. WILSON,
Petitioner,

-vs-

RUSSELL E. LASH, Warden
Indiana State Prison,
Respondent

BRIEF OPPOSING PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether Petitioner was deprived of a fair trial by the fact that his attorney was the publisher of a small newspaper in the county in which the

trial was held; whether this fact constituted a conflict of interest in violation of Petitioner's constitutional rights under the Sixth Amendment to assistance of counsel.

STATEMENT OF THE CASE

This case has had, since the 1963, death of an elderly lady in Warren, Indiana, a long and tortuous in history, not all of which need be detailed here. Fortunately, counsel for Petitioner has narrowed the numerous and divergent contentions that marked this litigation in earlier stages to one basic question, i.e., conflict of interest. Consequently, Respondent need not detail all earlier proceedings.

Petitioner filed for a writ of habeas corpus, which was denied without hearing by the District Court (N.D. Ind.). The

Seventh Circuit reversed and remanded for an evidentiary hearing. Wilson v. Phend 417 F.2d 1197 (not 1147) (7th Cir. 1969).

An evidentiary hearing was held in the District Court on February 9 and 10, 1970. His petition was denied. Petitioner's motion for certification of probable cause was denied July 20, 1970, because the case did not present a substantial question for review.

The Findings of the District Court were as follows:

> "This cause came on for hearing on February 9 and 10, 1970, before the court without the intervention of a jury and the court having duly considered the evidence and being fully advised in the premises finds and concludes that

"FINDINGS OF FACT

1. Petitioner did not tell the truth, could not remember the facts relating to allegations made in his application for habeas corpus relief or testified to facts which showed Petitioner was not entitled to relief on his application. Witnesses called by the Petitioner testified to facts which showed Petitioner was not entitled to federal habeas corpus relief. Witnesses for Respondent told the truth and controverted or adequately explained all matters relating to allegations made by Petitioner.

2. There was no conflict of interest between Bangs' position as trial counsel for Petitioner and his ownership of the Huntington News a local newspaper. The Huntington News is a newspaper of limited distribution. During the period in question, that is to say, from the day of the murder until the jury returned a verdict, only six articles pertaining to the deceased or to Petitioner appeared in the Huntington News. Of these six articles only four

appeared in the Huntington News while Bangs was representing Petitioner, which could have been read by the jury before a verdict was returned. One article, the day after the murder, appeared before Bangs was retained to represent Petitioner or before he entered an appearance in the case and another article, reporting the verdict of the jury, did not appear until after the jury had returned their verdict. The newspaper itself never consisted of more than four pages. The editions of the Huntington News in which the articles regarding the deceased or Petitioner appeared were distributed to not more than three hundred patrons in the county. Bangs did not personally write any of the articles regarding the deceased or Petitioner. His role was that of editor only. When Bangs was retained by Petitioner's father to represent Petitioner, Bangs immediately ordered his staff to unobtrusively report proceedings involving Petitioner. Accordingly, the articles regarding Petitioner appearing

in the Huntington News were short, factually oriented and unobtrusively reported. The four articles appearing in the Huntington News while Bangs was representing Petitioner and which could have been read by a juror prior to the verdict were factually oriented and comprised a total of approximately 15 column inches. Not one of the six articles appearing in the Huntington News can be regarded as inflamatory or as tending to arouse prejudice. In no way, did Bangs' position as publisher, owner and editor of the Huntington News detract from the degree of his representation of Petitioner at his trial. Petitioner's picture did not appear in any edition on the Huntington News.

3. All newspaper publicity regarding the deceased and Petitioner was introduced into evidence in this cause. Articles appearing in the Herald Press, the leading newspaper in the county were factually oriented, and could not be considered inflamatory or of such a nature as would tend to create prejudice

in the minds of the reader. Most of the newspaper articles regarding deceased and Petitioner were published druing the trial itself, a period during which the jury was sequestered on a pretrial motion made by Bangs, in Petitioner's behalf. Petitioner's jury was effectively insulated from all publicity during the trial.

4. There was an absolute failure of proof to show that 'local newspapers had whipped the public into such a frenzy that Petitioner was adjudged guilty long before his trial [,] [that] [h]is arrest was tantamount to conviction [or that] [h]e was an object of scorn of the entire reading public.' There was also an absolute failure of proof that even one of the twelve jurors, who found Petitioner guilty had seen, read, or been affected, much less prejudiced, by an news account regarding the murder or the trial in any newspaper or magazine or on the radio or television.

5. There was absolutely no prejudicial publicity from which

to protect Petitioner. Petitioner was not rushed to trial. A change of venue would have been unwarranted. Prior to Petitioner's trial, Bangs moved, in Petitioner's behalf, to sequester the jury who was to hear the evidence at Petitioner's trial, Petitioner's pretrial motion to sequester to the jury was granted. The jury was sequestered during the whole of Petitioner's trial at a local hotel, completely cut off from the news media. Judge Ade, the trial judge, duly ordered the jury to read no newspapers, magazines, to listen to the radio or to watch the television until they had returned a verdict. There was an absolute failure of proof to show that any one of the jurors read any newspaper or magazine article regarding Petitioner, or heard or saw any news account regarding Petitioner.

6. At his arraignment, Petitioner entered a plea of not guilty. Bangs did not change that plea. Bangs did enter an additional plea of not guilty by reason of unsound mind in Petitioner's

behalf, with the full knowledge and consent of Petitioner. The unsoundness of mind plea did not supplant or detract from Petitioner's prior plea of not guilty. Petitioner's unsoundness of mind plea was entered to put the degree of Petitioner's intoxication on the afternoon of the murder in issue. The plea was interposed as a defense and put the additional burden upon the State to prove Petitioner's capacity to commit the crime. Petitioner was examined by psychiatrists who testified at his trial regarding Petitioner's degree of intoxication during the afternoon of the murder. Petitioner went to trial on both pleas, on a plea of not guilty and on a plea of not guilty by reason of an unsound mind (intoxication).

7. Petitioner's testimony that Mrs. Walter Bonebrake, and only she, could have testified at his trial that the blood on his pants, a factor in his conviction, could have come from the victims of an automobile accident supposedly assisted by Petitioner, was completely uncorroborated. Petitioner was simply not believed as to this. Tending to discredit Petitioner's testimony on this

point was Mrs. Bonebrake's unexplained absence at the trial, even though Petitioner knew of her existence, knew she was alive, knew her address and had every opportunity to subpoena her as a witness in his behalf. Petitioner's testimony on this point was also discredited by James Moore, a witness in his behalf, who testified that he had discussed Petitioner's presence at the accident at length with Mrs. Bonebrake, but that she refused to sign an affidavit regarding Petitioner's claim. Bangs did not pursue this alleged evidence supposedly explaining the presence of blood stains on Petitioner's clothing because Petitioner had never mentioned the automobile accident or Mrs. Bonebrake to him. Furthermore, it could have been inferred from Petitioner's testimony that he did not learn of the accident to which he alludes until he reached the prison where other inmated produced newspaper articles describing the automobile accident.

8. Bangs faithfully pursued all leads, those given him by Petitioner (including all alibi witnesses) and those he gleaned from newspapers and Petitioner's family and friends in a futile effort to obtain exculpatory evidence. Petitioner's testimony conclusively showed that there were no witnesses who could have testified to his whereabouts during the crucial period in which the murder was committed and during which he was admittedly in the neighborhood alone, and seen alone. Testimony reported in the transcript of Petitioner's trial conclusively shows that Petitioner was at the murder victim's house. Petitioner has not shown the existence of one witness whose testimony could have posed an alibi to the murder with which he was charged.

9. Bangs' invariable practice was to file a motion for a new trial as a matter of course in all criminal cases which he defended. After trial, Bangs began preparation to file such a motion for new trial on Petitioner's behalf, by ordering a transcript of the Bill of Ex-

ceptions from the court reporter. Petitioner was transferred to the Indiana State Prison shortly after his conviction. While there, he prepared a motion for a new trial, pro se, without Bangs' knowledge or consent and mailed it to the trial court for filing. Bangs was then required, in order to assert legal grounds required for a new trial, to amend Petitioner's pro se motion for a new trial instead of filing his own motion for a new trial in Petitioner's behalf. Trial judge Ade, made aware of these circumstances by Bangs, found that the amendment was timely filed and ruled on Petitioner's motion as amended by Bangs.

CONCLUSIONS OF LAW

1. The law is with Respondent and against Petitioner.

2. Petitioner was adequately and effectively represented by competent trial counesl. Petitioner had a full and fair hearing in the state courts. None of Petitioner's rights under the Constitution of the United States

were violated.

3. There was no conflicts of interest between Bangs position as counsel and his ownership of the Huntington News. There was no prejudicial publicity in the Huntington News, the Herald Press or any other newspaper magazine circulated in the county, or in any broadcase over the radio or television in the county. No juror was prejudiced by any pre-trial publicity of any sort or nature. Bangs fully protected Petitioner from all publicity at the trial.

4. Petitioner's plea of not guilty was not changed. Petitioner's additional plea of not guilty by reason of unsoundness of mind (intoxication) was made with his knowledge and consent. Bangs presented all alibi witnesses and all exculpatory evidence of which he knew and of which he had been informed or could discover.

5. Bangs fully performed his duty as an attorney in preparing and filing a motion for a new trial in Petitioner's behalf.

6. Bangs fully and competently

represented Petitioner at all stages of the proceedings against Petitioner in the state courts." (. . . 1136)

WHY THE WRIT SHOULD NOT BE GRANTED

Petitioner has not raised a claim in a case of sufficient clarity to warrant review by this Court of a "conflict of interest" question. Petitioner simply assumes a conflict of interest because his privately retained lawyer owned a small newspaper of 500 circulation in a county of 33,000 population in which appeared a few stories concerning the crime for which Petitioner was tried.

The facts as found by the District Court and affirmed by the Seventh Circuit were that the outside newspaper articles

"were factually oriented, and could not be considered inflammatory or of such a nature as would tend to create prejudice in the minds of the reader" (sic). Also, "as to pre-trial publicity the court found that it had not 'whipped the public into such a frenzy that Petitioner was adjudged guilty long before his trial' as Wilson alleged." (7th Cir. Opinion, p. 3). The Seventh Circuit also noted that at Petitioner's counsel's motion, the jury had been sequestered during trial. The courts below found no proof that the jurors were affected by any pre-trial publicity. (No claim is presented to this Court as to pre-trial publicity in any publications or media other than those owned by Petitioner's lawyer, one Bangs.

Bangs' newspaper covered the story of Petitioner's arrest. His paper only consisted

of four pages. Of the six articles found by the courts below to have appeared in Bangs' paper, the jury could only have seen four, and these contained only fifteen column inches. They were "short, non-inflammatory and related to facts calmly reported." (Opinion, p. 4). The District Court found and the Seventh Circuit affirmed that Bangs' efforts afforded Petitioner effective assistance of counsel. These findings are supported by the record. Thus, Petitioner's claim essentially is that because there was the possibility of a conflict of interest that might prejudice him, the fact that he was in reality afforded adequate representation is of no moment.

While the Seventh Circuit did note

that Bangs' role was "grossly inappropriate," it did find that this dual role did not result in prejudice to Petitioner. Bangs actually afforded Petitioner effective assistance of counsel.

It must be noted that Petitioner knew Bangs published the paper, as did his father who privately retained Bangs. "At no time before, during or after trial did Wilson complain about Bangs' conduct as attorney at the trial or on appeal." (Opinion p. 5).

Countless cases have repeated the familiar standard of representation: before a claim of ineffective counsel will vitiate a conviction, it must appear that the trial was a sham, a farce, a pretense or a mockery of justice. Sims v. Lane (7 Cir. 1969) 411 F.2d 661, cert.den 90 S.Ct. 378, 396

U.S. 943; Linebarger v. State of Oklahoma (10 Cir. 1968), 404 F.2d 1092, cert den. 89 S.Ct. 1218, 394 U.S. 938.

A per se rule in conflict of interest cases would not be wise. It was impliedly rejected in Olshen v. McMann (2 Cir. 1967), 378 F.2d 993. In that case counsel for the defendant has represented a prosecution witness previously. The Court distinguished Glasser v. United States (1942), 315 U.S. 60, 62 S.Ct. 457 where counsel simultaneously represented at trial defendants with competing interests. The court recognized disapprovingly a "possible conflict of interest" but declined to grant habeas corpus for abstract claims, noting "any inference of prejudice is forcefully negated by Fischbein's

vigorous cross-examination of Blumstein and his exhaustive attack on Blumstein's credibility." 378 F2d 994. "Although some judicial initiative is properly adviseable when the possibility of a prejudicial conflict is apparent to the trial court, none is required where, as here, the record is barren of both prejudice and any possible conflict." 378 F.2d 994. See also U.S. v. Maroney (W.D. P. 1968), 280 F. Supp. 277.

In a case which adopted a per se conflict of interest rule, a distinction was noted between the private retainer of counsel and pauper appointment:

> "If the state-court defendant employed the lawyer or sought his employment and was fully aware of the situation, he has no federal constitutional right to complain that

> the lawyer's acceptance of his employment might have been ethically questionable. When the defendant exercises no choice, however, when his lawyer is selected reaardless of his wishes, the potential conflicts of interest which underlie the ethical considerations are matters of federal concern." Goodson v. Peyton (4 Cir. 1968), 351 F2d 905, 907.

Thus, where the defendant has privately retained his lawyer, as here, he cannot "be allowed to complain collaterally of a situation he created voluntarily." 351 F2d 909. So in this case Petitioner fails to show cause for relief because he voluntarily created the situation of which he now complains. Moreover, he cannot prevail because there was no actual prejudice. The adoption of a per se rule would produce unnecessary inflexibility.

CONCLUSION

For these reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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